

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DIANE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

January 20, 2005

No. 249138

Macomb Circuit Court

LC No. 02-003331-FC

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction for second-degree murder, MCL 750.317. Defendant was sentenced to thirty-one to seventy-five years in prison. We affirm.

Defendant's first issue on appeal is that the prosecution failed to present sufficient evidence to support her conviction. We disagree. In reviewing the sufficiency of evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved the essential elements of the crime beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). Circumstantial evidence and reasonable inferences drawn there from are sufficient to establish the elements of a crime. *People v Tanner*, 469 Mich 437, 444 n 6; 671 NW2d 728 (2003).

In order to support a second-degree murder conviction, the prosecution must prove: (1) a death, (2) caused by defendant's act, (3) with malice, and (4) without justification or excuse. MCL 750.317; *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002). Malice is "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.*, quoting *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). When the defendant sets in motion actions likely to cause death or great bodily harm, malice may be inferred. *Werner, supra*. An actual intent to harm or kill is not required. Rather, the prosecution must establish the intent to commit an act that is in obvious disregard of life-endangering consequences. *Id.*

Viewed in a light most favorable to the prosecution, the evidence presented was sufficient to establish that defendant's malicious acts caused the victim's death. *Hunter, supra*. Defendant's neighbor alerted the police because she could hear screaming, skin-to-skin contact,

and an elderly man crying in defendant's apartment. These sounds had been occurring for two weeks. From the neighbor's basement, Officer Ronald Visbara heard the sound of slapping and heard defendant yelling obscenities at the victim. Officers immediately entered defendant's apartment where they found the victim, a seventy-five-year-old man, in a severely emaciated, dehydrated, and dirty condition. He was covered with cuts and bruises. The victim responded to an officer's inquiry for information by repeating, "Stop hitting me, no more." He had been living with defendant for several months. The victim was taken to a hospital, where he died two weeks later, never regaining coherence.

Dr. Werner Spitz performed an autopsy on the victim's body and testified that the victim's injuries were consistent with being slapped, being restrained, and defending himself. Spitz stated that the victim had undergone chronic abuse and repeated beatings. He concluded that the cause of death was pneumonia and sepsis, complicated by multiple trauma, and that the manner of death was homicide. A search of defendant's house revealed restraint devices. Defendant told police that she had taken the victim into her home as an act of charity.

Defendant argues on appeal that the manner-of-death evidence was too speculative to prove that the victim died as a result of a criminal act because the victim was an elderly man with emphysema who died after two weeks in the hospital. However, Spitz testified unequivocally that the victim had been chronically abused, that his death should not have occurred, and that the manner of death was homicide. The testimony of the police, the neighbor, and the restraints found at the home corroborated the physical evidence of abuse. Therefore, the prosecution presented sufficient evidence to prove beyond a reasonable doubt that defendant abused the victim, that the abuse caused his death, and that defendant willfully disregarded the likelihood that the natural tendency of her acts would cause death or great bodily harm. *Werner, supra*.

Defendant's next alleges that the prosecutor deprived her of a fair trial by engaging in misconduct when he elicited, without notice, testimony in violation of MRE 404(b). We disagree. Defendant did not object at trial to the introduction of this evidence. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Reversal is warranted only when the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant raises a mixed issue of prosecutorial misconduct and improper introduction of bad acts evidence. Use of bad acts as evidence is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's past conduct. *Werner, supra* at 539. Although not an essential element of a crime, proof of motive in a prosecution for murder is always relevant, and evidence of other acts to prove motive is admissible under MRE 404(b)(1). *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999).

In the present case, an investigating officer testified that when a search warrant was executed upon defendant's residence, credit card applications, bank accounts, and a purse and wallet belonging to an individual unrelated to defendant were found in the home. This purse and wallet had been reported as stolen from a grocery store near defendant's residence. Contrary to the assertion by defense counsel, this information was not presented to the jury to demonstrate

that defendant had committed the theft of the purse and wallet. Indeed, the circumstances regarding the theft were never presented at trial. Rather, the information was elicited with the credit card and other financial information to indicate that defendant's motive for the abuse of the victim was financial opportunity. Because motive is always relevant in a prosecution for murder, *Rice, supra*, we cannot conclude that admission of this evidence constituted an abuse of discretion. Accordingly, plain error affecting substantial rights was not established. *Watson, supra*.

Finally, defendant claims that she received ineffective assistance of counsel. We disagree. Because defendant failed to preserve this issue for our review by moving for a new trial or evidentiary hearing in the trial court, our review is limited to errors by counsel evident in the existing trial record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance fell below an objective standard of reasonableness and a reasonable probability that the outcome of the trial would have been different, but for trial counsel's error. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2004). The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.*

Defendant first claims that her trial counsel was ineffective because he did not move in limine or object at trial to prevent the admission of evidence regarding the stolen purse and wallet. A failure to object may be considered trial strategy, and this Court will not substitute its judgment on matters of trial strategy. *Id.*

Based on the record available, it appears that defense counsel purposefully did not object to the admission of the stolen purse and wallet and the financial information because he sought to interject the issue of a *lack* of a financial motive into the proceedings. The defense cross-examined the police investigator regarding the items found in the home. The investigator testified on cross-examination that the home was not extravagantly furnished with expensive appliances. Thus, the furnishings of the home did not reflect a financial motive. Moreover, the defense noted that the financial benefits received by the victim were minimal. Accordingly, the defense asserted that the victim was not the "cash cow" held captive in the basement as portrayed by the prosecution. Thus, the claim of ineffective assistance of counsel on this basis is not supported by the lower court record in light of the defense questions and proofs.

Finally, defendant claims that she received ineffective assistance of counsel because her trial counsel did not move for the appointment of an expert forensic pathologist to contradict the testimony of the prosecution's forensic pathologist. Trial counsel's conduct with regard to calling an expert witness is presumed to be a permissible exercise of trial strategy, for which this Court will not substitute its judgment. *Id.* Defendant offers no proof that an expert witness would have testified favorably if called by the defense. Nothing in this record indicates whether an expert witness would have aided defendant. Accordingly, defendant has not established a reasonable probability that, but for trial counsel's alleged error, the result of the proceedings would have been different. *Id.*

Affirmed.

/s/ Hilda R. Gage

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood